130030

STATE OF MICHIGAN

IN THE SUPREME COURT

CAROL KRUSCHKE,

Plaintiff-Appellee

vs.

JAMES R. LOVELL, M.D., and
JAMES R. LOVEL, M.D., P.C.,

Defendants-Appellants,

Supreme Court No. 130030

Court of Appeals Case No. 259601

Lower Court No. 03-040879-NH

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AMICUS CURIAE BRIEF OF MICHIGAN STATE MEDICAL SOCIETY IN SUPPORT OF APPLICATION FOR LEAVE TO APPEAL

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STATEMENT OF QUESTION PRESENTED

Whether this Court should grant leave to appeal from and reverse a Court of Appeals decision which erroneously concludes that Plaintiff did not "discover" a possible claim within the meaning of MCL 600.5838a until she was advised by a subsequent treating physician that the hysterectomy that she had nearly 4 ½ years earlier was medically unnecessary?

The Trial Court would say "yes."

The Court of Appeals would say "no."

Plaintiff-Appellee says "no."

Defendants-Appellants say "yes."

Amicus Curiae Michigan State Medical Society says "yes."

STATEMENT OF PROCEEDINGS AND INTEREST OF MSMS

Amicus Curiae Michigan State Medical Society ("MSMS") is a professional association that represents the interests of over 14,000 physicians in the State of Michigan. Organized to promote and protect the public health and to preserve the interests of its members, MSMS has a continuing interest in the interpretation and application of statutes which govern the assertion of claims for medical malpractice. This case, which involves the statute of limitations "discovery provision," raises such an issue.

The Legislature has directed that a claim for medical malpractice be brought within two years of the date of the act or omission that is the basis for the claim, or within six months after the plaintiff discovers or should have discovered the existence of the claim. MCL 600.5805(6); MCL 600.5838a. In this case, the two-year limitations period expired before the action was commenced. However, Plaintiff-Appellee Carol Kruschke ("Ms. Kruschke") asserted that the claim was timely because she commenced the action within six months of being told by another physician that the

hysterectomy Defendant-Appellant Dr. James R. Lovell performed nearly 4 ½ years earlier was "medically unnecessary." The Court of Appeals agreed with Ms. Kruschke and reversed the Circuit Court's entry of summary disposition for Dr. Lovell.

MSMS believes that the Court of Appeals failed to faithfully follow the rule articulated by this Court in *Solowy v Oakwood Hopsital* to determine when a plaintiff should be deemed to have discovered a claim within the meaning of MCL 600.5838a. For reasons more fully explained below, MSMS urges this Court to grant the application for leave to appeal and reverse the Court of Appeals' decision.[1]

STATEMENT OF FACTS

Lacking an independent basis for reciting the facts, MSMS relies upon the Statement of the Case, Nature of the Proceedings, and Statement of Facts recited in Defendants-Appellants James R. Lovell, M.D., and James R. Lovell, M.D., P.C.'s (collectively "Dr. Lovell") Application for Leave to Appeal.[2]

ARGUMENT

I. This Court Should Grant Leave to Appeal and Reverse the Clearly Erroneous Decision of the Court of Appeals.

To warrant consideration, an application for leave to appeal from a Court of Appeals decision must involve a legal principle of major significance to the state's jurisprudence, be clearly erroneous and cause material injustice, or conflict with a Supreme Court decision or another decision of the

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[1] This brief is being filed pursuant to the invitation of this Court in its April 14, 2006 Order directing that the case be scheduled for oral argument "on whether to grant the application or take other peremptory action."

[2] Dr. Lovell's Application and Plaintiff's response mistakenly characterize the Defendants as "Appellees." This Court's April 14, 2006 Order designates the Defendants as the "Appellants."

Court of Appeals. MCR 7.302(B). The pending application in *Kruschke v Lovell* meets this criteria. *Kruschke* involves the statute of limitations discovery provision contained in MCL 600.5838a. This Court interpreted that provision in *Solowy v Oakwood Hospital,* 454 Mich 214; 561 NW2d 843 (1997). At that time, this Court explained that a plaintiff discovers a *possible* claim within the meaning of the statute when on the basis of *objective* facts, a claimant is aware of an injury and its possible cause. *Solowy* at 222. With this awareness, a plaintiff is equipped with the knowledge necessary to preserve and diligently pursue the claim. *Solowy* at 223.

In granting summary disposition for Dr. Lovell, the Trial Court properly applied the *Solowy* standard. The Court of Appeals' reversal of that decision takes *Solowy* in a new direction. Under the Court of Appeals' majority opinion, it is not enough to know of a *possible* claim; to the contrary, discovery does not occur until that *possibility* has evolved into a concrete understanding that the standard of care has been violated. As more fully explained below, the majority's analysis belies the *Solowy* standard. Leave to appeal should be granted.[3]

A. The Court Of Appeals Decision Is Clearly Erroneous.

The statute of limitations applicable to Ms. Kruschke's claim requires that an action for medical malpractice be filed within two years of the act or omission that is the basis for the claim or within six months after the plaintiff discovers or should have discovered the existence of the claim. MCLA 600.5838a(1) and (3); MCLA 600.5805(6). It is the plaintiff's burden to prove that she

[3] The underlying issue raised in this appeal, whether a claim is barred by the statute of limitations, is a question of law subject to de novo review. *Solowy* at 216. A trial court's grant or denial of a motion for summary disposition is similarly accorded de novo review. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998); *Roberts v Mecosta County Gen Hosp,* 466 Mich 57, 62; 642 NW2d 663 (2002).

"neither discovered nor should have discovered the existence of the claim" more than six months before serving the notice of intent. MCLA 600.5838a(3) provides:

> (3) An action involving a claim based on medical malpractice under circumstances described in subsection (2)(a) or (b) may be commenced at any time within the applicable period prescribed in section 5805 or sections 5851 to 5856, or within 6 months after the plaintiff discovers or should have discovered the existence of the claim, whichever is later. The burden of proving that the plaintiff, as a result of physical discomfort, appearance, condition or otherwise, neither discovered nor should have discovered the existence of the claim at least 6 months before the expiration of the period otherwise applicable to the claim is on the plaintiff. A medical malpractice action that is not commenced within the time prescribed by this subsection is barred.[4]

This Court has held that discovery of a claim occurs when, on the basis of objective facts, a claimant is aware of an injury and its possible cause. *Solowy* at 222; *Moll v Abbott Laboratories*, 444 Mich 1, 24; 506 NW2d 816 (1993). The test is an objective one, and the ensuing claim need only be "possible" - not "likely," *Solowy* at 221-222, and certainly not definite. With this awareness, a plaintiff is equipped with the knowledge necessary to preserve and diligently pursue the claim, *Solowy* at 223; *Moll* at 24, and it is plaintiff's duty to do so. *Poffenbarger v Kaplan*, 224 Mich App 1, 12; 568 NW2d 131 (1997), overruled on other grounds by *Miller v Mercy Mem'l Hosp Corp,* 466 Mich 196; 644 NW2d 730 (2002).

The totality of the information is to be considered when deciding whether a plaintiff discovered or should have discovered the existence of her claim. However, *a plaintiff need not know the full consequences of an injury or of its severity* to be charged with discovery. *Stephens v Dixon*, 449 Mich 531, 537; 536 NW2d 755 (1995); *Moll* at 24. *Nor is a legal or medical confirmation of*

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[4] In addition to the six-month discovery period, MCL 600.5838a(2) imposes a six-year statute of repose. MCL 600.5838a(2)(a) and (b) exempts fraudulently concealed claims and claims involving loss or damage to a reproductive organ from MCL 600.5838a(2) and subjects such claims to the provisions of MCL 600.5838a(3).

wrongdoing deemed the triggering factor. See e.g., Szatkowski v Isser, 151 Mich App 264, 270; 390 NW2d 668 (1986) (it is not necessary that plaintiff obtain a medical opinion stating that the act in question constitutes negligence); *Turner v Mercy Hosp,* 210 Mich App 345, 353; 533 NW2d 365 (1995) ("the discovery rule does not act to hold a matter in abeyance indefinitely while a plaintiff seeks professional assistance to determine the existence of a claim"); *Solowy* at 222 (plaintiff needn't know with certainty that he has a claim); *Tonegatto v Budak*, 112 Mich App 575, 583-584; 316 NW2d 262 (1982) (plaintiff needn't know the details of the evidence by which to establish his claim); *Hoffman v Mt. Clemens General Hosp*, 183 Mich App 498, 503; 455 NW2d 49 (1990) ("discovery rule does not depend upon a confirmation of the existence of malpractice."). Rather, a "plaintiff must act diligently in discovering his cause of action and cannot simply sit back and wait for others to inform him of his possible claim." *Grimm v Ford Motor Co,* 157 Mich App 633, 639; 403 NW2d 482 (1986).

By this standard, Ms. Kruschke's assertion, and the Court of Appeals' conclusion, that Ms. Kruschke did not discover, nor should she have discovered, the existence of a possible claim until she was advised that the hysterectomy performed by Dr. Lovell was medically unnecessary, is neither legally nor factually tenable.

1. Ms. Kruschke Was Aware, or Should Have Been Aware, of a Possible Claim More Than Six Months Before Serving the Notice of Intent.

Ms. Kruschke's argument is based upon an erroneous standard and ignores essential facts. This is apparent from her statement of the issues. Although the question is stated and restated five different ways, it is never stated in the terms articulated by this Court in *Solowy* – whether she knew of her injury and its possible cause. Rather, Ms. Kruschke asks whether it was "reasonable" for her "not to know medical malpractice had occurred;" whether she had "any evidence or reason to

believe" the hysterectomy was inappropriate or medically unnecessary; whether the action was filed within six months of the date she "discovered or should have discovered Dr. Lovell's medical malpractice;" and whether the suit was filed within six months of "discovering the potential medical malpractice." *See* Counter-Statement of Questions Involved, Kruschke's Brief in Opposition to Application for Leave to Appeal ("Kruschke Brief") at v-vi.

Ms. Kruschke's failure to pose (and answer) the proper question is compounded by her failure to candidly state the underlying facts. Two significant omissions are particularly glaring. Nowhere in her 10 1/2-page "Statement of Facts and Material Proceedings" does she mention the persistent and ongoing pain she experienced following the surgery (other than in describing the Court of Appeals opinion).[5] Nor does she disclose that she fired Dr. Lovell prior to her move to Ohio, and her frustration over the continuing pain. Indeed, Ms. Kruschke never mentions that she *left* Dr. Lovell and began seeing another physician.[6] Both factors have been pivotal in discovery rule analysis.

The plaintiff's awareness of her recurring symptomatology was considered by this Court in *Solowy,* where plaintiff alleged that defendant's failure to advise her that a basil cell carcinoma could recur, caused her to delay seeking treatment when it reappeared. This Court rejected the assertion

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[5] The only other apparent mention of ongoing, post-surgical pain anywhere in the Brief is on page 20, where Ms. Kruschke recites "Although she experienced pain following surgery, she likewise had experienced pain before surgery."

[6] Ms. Kruschke more euphemistically states in her response to the Application, "Following the six week post-operative check, Ms. Kruschke continued to follow with Dr. Lovell's office and likewise saw Licia Raymond, M.D., for estrogen replacement services." Kruschke's Brief at 4. Ms. Kruschke's statement that "she believed her treating physician, as well as the other treating physicians whom she saw after Dr. Lovell, prior to October 2002," Kruschke Brief at 18, does not acknowledge or disclose her apparent dissatisfaction with or termination of Dr. Lovell.

that discovery did not occur until Ms. Solowy learned which of two possible diagnoses for the lesion had been confirmed, finding that "even before the diagnosis was confirmed, Mrs. Solowy was aware that her symptoms were identical to those she experienced five years earlier" and in her words "it started all over again." Consequently, this Court said, "her observations of the discomfort and of the appearance and condition of her ear should have aroused some suspicion in her mind that the lesion might be cancer" which, coupled with a subsequent treater's "explanation that the basal cell carcinoma could recur and that the lesion could be a recurrence ... supplied Mrs. Solowy with enough information to satisfy the standard." *Id.* at 228.

The Court of Appeals has followed this Court's well-reasoned analysis in *Solowy.* For example, in *Smith v Beuker,* unpublished opinion per curiam of the Court of Appeals, issued December 9, 2003 (Docket No. 241169), plaintiff continued to experience pain in her knee after defendant performed reconstructive surgery and a subsequent arthroscopic evaluation.[7] Ten months after the initial surgery, defendant told plaintiff he had no further treatment to offer her and continued to prescribe pain medication until he retired. A subsequent physician performed additional reconstructive surgery, after which he advised plaintiff that an improperly located screw from the first surgery was the likely cause of her continuing problems. Plaintiff filed a notice of intent within six months of that conversation. Defendant moved to dismiss the ensuing litigation on statute of limitations grounds. The motion was granted by the Trial Court and affirmed by the Court of Appeals. The Court explained:

> Plaintiff argues that the trial court erred by granting defendant's motion for summary disposition. She asserts that defendant led her to believe that pain in her knee was to

[7] The unpublished decisions are attached to this brief in alphabetical order.

> be expected following ACL reconstructive surgery, and that it was not until April 2000 when Dr. Redmond performed surgery that she learned that a screw was not positioned correctly during the February 1998 surgery and was the source of continuing pain. We disagree and affirm the trial court's order granting defendant's motion for summary disposition. The evidence showed that when defendant performed ACL reconstructive surgery on February 3, 1998 he told plaintiff the healing process would be lengthy. Plaintiff engaged in physical therapy; however, her condition did not improve. As early as June 1998 plaintiff questioned another physician regarding the need for further surgery. In June 1999 Dr. Redmond diagnosed a failed ACL reconstruction, and in September 1999 he recommended that plaintiff have further ACL reconstructive surgery to deal with her continuing problems ... ***The evidence showed that as of September 1999 plaintiff was aware that the initial surgery had not addressed her problem, and that she needed further ACL reconstructive surgery to deal with her continuing pain and discomfort. The fact that plaintiff was not aware that defendant had misplaced a screw was not necessary for her to have discovered her claim.***

Id. at 5-6 (emphasis added).

Discovery of a claim was similarly held to have occurred in *Brown v Malik*, unpublished opinion per curiam of the Court of Appeals, issued October 1, 1999 (Docket No. 208045), where plaintiff continued to experience symptoms following surgery to treat a duodenal stricture and ultimately "gave up" on the defendant-physician. The Court of Appeals explained:

> Brown testified that, on the day after the surgery performed by Ching, she began to suffer from diarrhea, which she had not previously experienced. She also stated that she realized immediately that the surgery had done nothing to lessen her original gastrointestinal problems because she continued to experience vomiting and indigestion. Most importantly, Brown testified that, after Ching performed an endoscopy in June 1994 and told her that "everything was fine," she "gave up on Dr. Ching" and "went to see Dr. Malik." ***Plaintiff took this course of action because she knew that whatever procedure Ching had performed was ineffective.*** Therefore, although Brown did not receive a definitive diagnosis of the source of her continuing problems until April 1996, she was aware of a possible cause of action against defendants well before that time.

Brown at 13 (emphasis added). [8] Regrettably, the Court of Appeals departed from the *Solowy* analysis in *Kruschke*.

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[8] *See also, Bryant v Detroit Medical Center*, unpublished opinion per curiam of the Court of Appeals, issued November 27, 2001 at 12-13 (Docket No. 223132) ("plaintiff's physical symptoms and lack of successful treatment should have alerted plaintiff to his possible cause of action"); *Rojas v Sparrow Hospital,* unpublished opinion per curiam of the Court of Appeals, issued August 10, 2001 at 8 (Docket No. 222298) ("plaintiffs cannot hold the period of limitation in abeyance while they seek professional assistance to determine the existence of a claim"); *Horton v St. John Health System,* unpublished opinion per curiam of the Court of Appeals, issued November 6, 2001 at 4 (Docket No. 222952) ("Under the possible cause of action standard, the decedent should have discovered that the progression of her cancer to an advanced state was possibly caused by defendant's alleged failure to timely diagnose her condition"); *Micielli v Heinken,* unpublished opinion per curiam of the Court of Appeals, issued November 2, 2001 (Docket No. 225552) (when plaintiff learned that he had sustained liver damage in July 1997, he "should have been aware of his injury (liver damage) and its possible cause (the methotrexate and Heinken's failure to advise him that it could cause liver damage, to monitor him for development of liver damage, and to diagnose the condition)"); *Perry v Resnick,* unpublished opinion per curiam of the Court of Appeals, issued April 6, 2001 (Docket No. 222494) (under an objective test, plaintiff should have acted with diligence in pursuing his belief that he had a possible claim within one month of surgery); *Cabell v Carino*, unpublished opinion per curiam of the Court of Appeals, issued October 20, 2000 (Docket No. 214611) (summary disposition affirmed where plaintiff testified that he was aware of a problem with his toe and actually believed that the cast placed on his ankle and foot by defendant had caused the problem); *Rugg v Sparrow Hosp,* unpublished opinion per curiam of the Court of Appeals, issued January 17, 2003 (Docket No. 234814) (plaintiff was aware of his injury (recurring cancer) and its possible cause (failure to perform biopsy) more than six months prior to filing); *Meixner v Henry Ford Hospital,* unpublished opinion per curiam of the Court of Appeals, issued October 25, 2002 (Docket No. 232334) (plaintiff smoker with a persistent cough was held to have discovered a claim for failure to diagnose cancer more than six months prior to filing when although she was never given the results of a chest x-ray in 1993, she was diagnosed in 1997 with advanced stage cancer and she acknowledged that while she was undergoing treatment in 1998, she suspected there was a problem with the treatment she had received); *Duenaz v Barnett,* unpublished opinion per curiam of the Court of Appeals, issued August 17, 2001 (Docket No. 224345) (plaintiff complained of counsels' deficiencies to both MAACS and the AGC well before the six-month period began); *Mielewski v Laboratory Corp of America*, unpublished opinion per curiam of the Court of Appeals, issued February 12, 2002 (Docket No. 225269) (claim barred where plaintiff was aware of decedent's "pap smears being wrong and this being wrong and something else being wrong"); *Spektor v Sinai Hospital,* unpublished opinion per curiam of the Court of Appeals, issued August 12, 2003 (Docket No. 239081) (plaintiff discovered her claim prior to conversation with subsequent treating physician who told her he was mystified by the deterioration of her left leg); *Kooiker v Vagotis*, unpublished opinion per curiam of the Court of Appeals, issued August 21, 2003 (Docket No. 217209) ("Although she allegedly continued to have concerns about her appearance after her

2. The Court of Appeals' Focus on When Ms. Kruschke Knew the "Nature of Her Injury" Imposes a New Standard and Conflicts With This Court's Decision in *Solowy.*

A plaintiff need not understand the "nature of her injury" for discovery to occur. Although not identical in context, this Court explained in *Stephens v Dixon*, *supra,* that the discovery rule is not available where a plaintiff merely misjudges the severity of a known injury. 449 Mich at 537-538. Rather, "the discovery rule applies to the discovery of an injury, not to the discovery of a later realized consequence of the injury." *Id.,* quoting *Moll* at 18. *See also, Bryant v Detroit Medical Center*, unpublished opinion per curiam of the Court of Appeals, issued November 27, 2001 at 10 (Docket No. 223132) ("Plaintiff did not need to precisely know the extent of his injury before the clock began to run").[9]

Framing the claim in a manner which particularizes the alleged injury, as Ms. Kruschke seeks to do, does not change the discovery date. All that is required is "some minimum level of information that, when viewed in its totality, suggests a nexus between the injury and the negligent act." *Solowy* at 226. That nexus must be found to exist here, when Ms. Kruschke: (1) expressed shock and anger that a complete hysterectomy had been performed; (2) continued to experience the

---

treatment under defendant ended, plaintiff presents no evidence that she made any further inquiry regarding the results of her breast surgery until she saw the specialist").

[9] In *Horton v St. John Health System,* unpublished opinion per curiam of the Court of Appeals, issued November 6, 2001 (Docket No. 222952), plaintiff alleged that discovery did not occur on her failure to diagnose cancer claim until the day she learned her condition was "terminal." The Court of Appeals disagreed, stating:

> Although plaintiff frames decedent's injury as death from cancer, and argues that decedent was not informed her condition was "terminal" until shortly before decedent's death, decedent's death was a consequence of the progression of her cancer to an advanced stage. Decedent's death was the "later realized consequence," i.e., the "subsequent damage" which does "not give rise to a new cause of action."

Id. at 4.

same symptoms post-surgery; and (3) obtained copies of her records from Dr. Lovell and transferred her care to another provider. Even aside from Ms. Kruschke's admitted reaction, the persistent symptomatology, coupled with Ms. Kruschke's pursuit of additional treatment from a different physician, suggests a subjective belief that the hysterectomy was ineffective. Such a belief would naturally lead a reasonable person to conclude that the hysterectomy was possibly the wrong treatment and thus, possibly unnecessary treatment. With this knowledge, Ms. Kruschke was, or should have been, aware of her injury and its possible cause.

The Court of Appeals seeks to avoid this result by improperly "focus[ing] on the nature of the claimed injury" and whether plaintiff had the "medical information, knowledge, and expertise necessary to realize that a surgical procedure was unwarranted." *Kruschke v Lovell,* unpublished opinion per curiam of the Court of Appeals, issued November 3, 2005 at 12-13 (Docket No. 259601). As the Court of Appeals majority saw the issue:

> A careful review of plaintiff's deposition testimony does not disclose that plaintiff believed or had any reason to believe that the hysterectomy was medically unnecessary, such that she should have timely sought an opinion from another doctor after the fact regarding the necessity of the surgery. Indeed, in post-operative office visits, Dr. Lovell reinforced to plaintiff that the hysterectomy was medically necessary.
>
> There is no evidence that any doctor, prior to plaintiff's treatment with Dr. Griffith, informed her that the hysterectomy was unnecessary. While plaintiff may have been upset with defendant Lovell for performing the hysterectomy because of notice issues or simply because of the nature of such an overwhelmingly serious and personal surgical procedure, we find nothing in the record suggesting that she questioned or had doubts about the medical necessity of the hysterectomy following the surgery. Moreover, there is absolutely no indication whatsoever in the record that plaintiff herself had the medical acumen to question the necessity of having a hysterectomy performed. Additionally, there is nothing in the factual history of this case that would lead a reasonable person, who lacks a medical background, to question the necessity of the surgery at the time of the hysterectomy.

This analysis departs from the directives of *Solowy*. The standard articulated by this Court in *Solowy* did not require a plaintiff to believe or have reason to believe that the treatment was medically

improper or to seek a timely opinion from another doctor. Such would be tantamount to knowledge that malpractice has been committed, a requirement that the *Solowy* analysis expressly disavows. The error in this analysis is underscored by the majority's reliance on the pre-*Solowy* standards articulated in *Jackson v Vincent,* 97 Mich App 568; 296 NW2d 104 (1980), quoting *Leary v Rupp,* 89 Mich App 145, 149; 280 NW2d 466 (1979) ("a person must know of the act or omission itself... and have good reason to believe that the act was itself improper or was done in an improper manner).

Further, in stating that it found "nothing in the record suggesting that [Ms. Kruschke] questioned or had doubts about the medical necessity of the hysterectomy following the surgery," the Court of Appeals majority overlooked Ms. Kruschke's persistent pain, shock and anger, and transfer of care to another physician, all of which suggest a belief that the rendered treatment – the hysterectomy – was possibly ineffective and unnecessary. Additionally, the discovery inquiry is not confined to what Ms. Kruschke in fact knew but what, based upon the totality of circumstances, she should have known. Under the alleged facts, Ms. Kruschke should have been aware of her alleged injuries and their possible cause.

The Court of Appeals further errs in posturing the alleged act or omission (the allegedly unnecessary hysterectomy) as a distinct claim. *See e.g., Kruschke* at 14, n3 ("Awareness of the 'injury' in the context of this case must mean awareness of a medically unnecessary hysterectomy"). Parsing the "injury" in this manner does not illuminate the issue and is contrary to this Court's directive in *Solowy* and *Moll.* Ms. Kruschke has but one claim arising out of the alleged improper treatment for her left lower quadrant and left-sided abdominal pain. That possible claim can only be discovered once. The date Ms. Kruschke postures as her discovery date – the date she was told that the hysterectomy was unnecessary – does not invoke a new "claim" but rather relates to the nature and extent of the alleged injury. Were it otherwise, the alleged malpractice could easily be found to

have multiple discovery dates. This is illustrated by an hypothetical which assumes that the initial source of the pain was misdiagnosed and, prior to the hysterectomy, the patient was treated with physical therapy that was later found to have resulted in nerve damage, followed by a medication regimen that caused a severe and permanent allergic reaction. Does the patient have three distinct and separately discoverable claims: one for nerve damage resulting from physical therapy that was unnecessary, another for an allergic reaction caused by medication which was unnecessary, and a third for infertility and premature menopause caused by an hysterectomy that was unnecessary? Not typically.

In this case, Ms. Krushcke's alleged injuries are related: loss of reproductive capacity; the need for hormone replacement therapy; and continued left sided pelvic/abdominal/back pain. Ms. Kruschke was aware of these conditions in 1998. They persisted from the time of her surgery and/or shortly thereafter. *See* Dr. Lovell's Application for Leave to Appeal ("Application") at 10. Ms. Kruschke was reportedly "very frustrated" that she continued to experience pain she had expected to be relieved by the surgery, and was "in shock and anger" over the fact that an hysterectomy had been performed. *Id.* As her attorney described it at the hearing on Dr. Lovell's motion for summary disposition:

> All she knows is that she's a woman, a young woman, a fertile woman, and she trusted a doctor.
>
> And then the next thing that happened, she goes into shock. What happened? Most people would at that age go into shock, that their life had been totally changed in an instant, and anger over losing those parts of one's body.

Transcript of November 4, 2004 Hearing ("Transcript") at 12.[10] A reasonable person would have acted on their feelings of shock, anger and frustration. As Judge O'Connell explained in his *Kruschke* dissent:

> Plaintiff visited her doctor for abdominal pain and was told, only after surgery, that total removal of her reproductive organs without her express consent was medically necessary. Undisputedly, the doctor informed plaintiff of the surgery's details, including the fact that the removed cyst only affected one of her ovaries; that the other ovary was only "superficially," however extensively, involved with endometriosis; and that her uterus and cervix were taken even though they appeared perfectly healthy. In the mind of a reasonable person, this information would have raised the possibility that the doctor went beyond what was "medically necessary," and knowledge of that possibility starts the clock ticking.

Kruschke at 17, n5.

Ms. Kruschke attempts to dissuade this Court from reversal by casting the issue as a matter of trust by Ms. Kruschke, who "had no superior knowledge or even half superior knowledge to cross-examine [Dr. Lovell] or to doubt what he had to say." Transcript at 16.[11] This is a non sequitor. One does not need to cross-examine his or her doctor in order to discover a possible claim. Inferior knowledge does not negate discovery. Ms. Solowy had inferior knowledge, as do most plaintiffs. But, as the Trial Court observed, a plaintiff need not understand that the standard of care has been violated in order to be deemed to have discovered a possible claim:

> When the Supreme Court says that the possible cause of action standard does not require the plaintiff to know that the injury was caused by the defendant doctor's alleged omission, it's my understanding of that decision that it would similarly provide that possible cause of action standard does not require the plaintiff to know

[10] The Transcript is attached to the Application as Exhibit 2.

[11] The Court of Appeals majority made the same point, referring to the "trust" that men and women place "in their physicians to do what is medically appropriate, predicated on the knowledge that a doctor, not the patient, has the medical training necessary to take the right course of action." *See Kruschke* at 14, n 3.

> that the injury was caused by the doctor's alleged breach of an applicable standard of care.

Transcript at 33.[12] This Court has said as much in *Moll*, explaining:

> Once a claimant is aware of an injury and its possible cause, the plaintiff is aware of a possible cause of action. We see no need to further protect the rights of the plaintiff to pursue a claim, because the plaintiff at this point is equipped with sufficient information to protect the claim. This puts the plaintiff, whose situation at one time warranted the safe harbor of the discovery rule, on equal footing with other tort victims whose situation did not require the discovery rule's protection.

Moll at 23-24.

RELIEF REQUESTED

The majority opinion in *Kruschke* did not heed this Court's direction in *Solowy* and *Moll*. The circumstances of *Kruschke* do not warrant a departure from *Solowy*. Leave to appeal and peremptory reversal should be granted. [13]

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[12] As the Trial Court properly observed, whether the hysterectomy was appropriate treatment for Ms. Kruschke's condition in 1998 is a standard of care issue.

[13] MTLA's assertion that this Court should abandon the standard applied in *Solowy* is without merit and should not be entertained in the present procedural context. *Solowy* is a well-reasoned opinion and has been diligently followed in the nine years since its release. It should not be disturbed. Similarly unfounded is the assertion that the *Kruschke* dissent advocates a standard that "requires that plaintiff, as a lay person, be charged with knowledge of medicine and medical procedures equal to medical providers." This same argument was made and rejected in *Solowy*. *See Solowy* at 225.